

NO. A11-1338

State of Minnesota
In Court of Appeals

Dennis M. Gallaher,

Appellant,

vs.

William Titler,

Respondent.

APPELLANT'S BRIEF, ADDENDUM AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF LEGAL ISSUE

- I. Under Minnesota law, a foreclosure by advertisement requires that notice of the sheriff's sale be published for six full weeks for the sale to valid. Here, the sheriff's sale at which defendant purportedly purchased the property occurred before the six-week publication period had expired. Is the sheriff's sale invalid and of no effect because it failed to comply with six-publication period required under Minn. Stat. § 580.03?**

Plaintiff moved for summary judgment, arguing that the sheriff's sale at which defendant purportedly purchased the subject property was invalid because the notice of sale had not been published for a full six weeks as required by Minn. Stat. § 580.03. (A. 13-28; 84-89) The district court rejected this argument, and applying the computation method set forth in Minn. Stat. § 645.15, ruled that a sheriff's sale that occurs on the last day of the six-week publication period is valid. (Add. 5)

Apposite Authority:

Pratt v. Tinkcom, 21 Minn. 142, 1874 WL 3773 (1874)
White v. Mazal, 192 Minn. 522, 257 N.W. 281 (1934)
Mansfield v. Fleck, 23 Minn. 61, 1876 WL 4261 (1876)
Worley v. Naylor, 6 Minn. 192, 1861 WL 1857 (1861)

STATEMENT OF CASE AND FACTS

This quiet title action involves the parties' claims of title to certain real property located at [REDACTED], which is legally described as Tower Unit No. 409 in Cloud 9 Sky Flats, Common Interest Community No. 1364, Hennepin County, Minnesota (the "Property"). (A. 3) Both parties claim to be fee owner of the Property.

Mr. Gallaher purchased the Property from Aurora Loan Services, LLC, for \$125,000. Aurora conveyed the property to him by Limited Warranty Deed dated February 29, 2009, which was recorded with the Hennepin County Recorder's Office on March 25, 2009, as Document No. A9337995. (Add. 3; A. 32-33)

Mr. Titler claims he purchased the Property at a sheriff's sale on January 29, 2009. (Add. 3; A. 83) Cloud 9 Sky Flats Association, Inc. had foreclosed an assessment lien in the principal amount of \$8,223.00 that it had asserted against the Property. (Add. 2-3; A. 39-45) The Affidavit of Publication attached to the Sheriff's Certificate states that the Notice of Assessment Lien Foreclosure Sale was published six times in Finance and Commerce. (Add. 3; A. 40.) The first date of publication was listed as December 18, 2008, and the last date of publication was January 22, 2009. (*Id.*) The times of publication are not listed. (A. 40)

On January 13, 2010, Mr. Titler filed a Complaint in Eviction in Hennepin County District Court, seeking to evict Mr. Gallaher's previous tenants from the Property. (Add. 3) At the trial, the tenants moved to dismiss his case, arguing that Mr. Titler had no right to bring an eviction proceeding against them because he did not have any ownership

interest in the Property. (Add. 3; A. 47-51) They argued that the January 29, 2009 sheriff's sale was invalid because notice of the sale had not been published for a full six weeks as required under Minn. Stat. § 580.03 (2008). (A. 48) According to the tenants, Minnesota law entitles an individual to the full six-week notice period, which includes the whole of the last day of the period, to satisfy the outstanding obligation giving rise to the foreclosure proceeding. (A. 48-52) They argued that the required publication and notice period was not complete until one full week had elapsed after the last date of publication. (*Id.*) By their calculation, the first day on which the sheriff's sale could occur was January 30, 2009. (A. 48, 52)

On January 28, 2010, the housing court rejected the tenants' arguments, and awarded Mr. Titler a Writ of Recovery of Premises and Order to Vacate. (Add. 3; A. 53-56) The tenants appealed to this court and obtained a stay of the writ of recovery. (A. 57) As they did below, the tenants argued Mr. Titler was not entitled to the immediate possession of the Property because he did not have valid legal title. (A. 61-63) They argued that the sheriff's sale was invalid because notice of the sale had not been published for a full six weeks as required under Minn. Stat. § 580.03 (2008). (*Id.*) In an Order Opinion, this court affirmed the decision of the housing court after refusing to consider the merits of tenants' arguments challenging Mr. Titler's claim of title, stating "the limited scope and summary nature of the eviction proceeding precludes appellants from challenging the propriety of the foreclosure in this eviction action." (*Id.*; Add. 3)

Based on this court's direction that other forums existed to challenge validity of the sheriff's sale and Mr. Titler's title to the Property, Mr. Gallaher commenced this quiet

title action to resolve the issue of title to the Property between him and Mr. Titler. (Add. 4; A. 65-71). The parties agreed the facts were not in dispute and presented the issue of the validity of Mr. Titler's claim of title to the district court on cross motions for summary judgment. (Add. 4) Mr. Gallaher argued that the sheriff's sale did not comply with the six-week publication required by Minn. Stat. § 580.03 because it occurred on the last day of the six-week publication period, and therefore was invalid. (A. 13-28; 84-89) In his motion, Mr. Titler argued that Minn. Stat. § 582.25 operated as a statute of limitations that barred Mr. Gallaher from challenging the validity of the sheriff's sale. (A. 79-83; 98-99)

The district court recognized that the foreclosure of an assessment is conducted in the same manner as a mortgage foreclosure by advertisement, which requires "six weeks' published notice" of the sheriff's sale. (Add. 4) To calculate the six-week publication period, the court applied Minn. Stat. § 645.15 (2010) and ruled that a sheriff's sale occurring on the last day of the sixth week satisfies the six-week publication. (*Id.*) It concluded that Mr. Titler was the fee owner of the Property. (Add. 5) Because Mr. Titler withdrew the defense raised in his summary judgment motion during the hearing, the district court did not decide the issue of whether Minn. Stat. § 582.03 operated as a statute of limitations that barred Mr. Gallaher from challenging the validity of the sheriff's sale. (Add. 5; T. 29-30)

This appeal follows.

ARGUMENT

I. STANDARD OF REVIEW

A reviewing court is not bound by and need not give deference to a lower court's decision on a purely legal issue. *Modrow v. JP Foodservice, Inc.*, 656 N.W.2d 389, 393 (Minn. 2003). Statutory construction is a question of law that this court reviews de novo. *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 393 (Minn. 1998).

II. THE SHERIFF'S SALE IS INVALID AND SHOULD BE SET ASIDE AS VOID BECAUSE IT FAILED TO COMPLY WITH THE SIX-WEEK PUBLICATION PERIOD REQUIRED UNDER MINN. STAT. § 580.03.

The district court erred in ruling that Mr. Titler is the fee owner of the Property. Mr. Titler did not acquire an interest in the Property because the sheriff's sale at which he purportedly purchased the Property failed to comply with the statutory publication requirement of Minn. Stat. § 580.03. The sale occurred one day before the full six-week publication period had expired, and therefore, is invalid and must be set aside. Because the sale was invalid, the Sheriff's Certificate issued to Mr. Titler did not convey valid legal title in the Property to him.

A. THE SIX-WEEK NOTICE PERIOD UNDER MINN. STAT. § 580.03 DOES NOT EXPIRE UNTIL THE END OF THE LAST DAY OF THE PERIOD.

In this case, the homeowner's association recorded and foreclosed an assessment lien pursuant to Minn. Stat. § 515B.3-116(h)(1) (2010). This section permits a homeowner's association to foreclose a lien for unpaid assessments in the same manner as a mortgage. Minn. Stat. § 515B.3-116(h)(1) (2010). The association has the power of sale to foreclose such a lien pursuant to Minnesota Statutes Chapter 580. *Id.* This

chapter governs and sets forth the procedures required to foreclose a mortgage by advertisement. *See* Minn. Stat. § 580.01 et seq. One requirement is that the mortgagee must provide six weeks' published notice of the sheriff's sale. Specifically, Minn. Stat. § 580.03, provides that "[s]ix weeks' published notice shall be given that such mortgage will be foreclosed by sale of the mortgaged premises."

The computation of this six-week time period is, in part, subject to Minn. Stat. § 645.15. This section provides that where the performance or doing of an act or a payment is ordered or directed, and the period of time or duration is prescribed and fixed by law, the time "shall be computed so as to exclude the first and include that last day of the prescribed or fixed period or duration of time." Minn. Stat. § 645.15.

The Minnesota Supreme Court has held that the six week period under Minn. Stat. § 580.03 is comprised of 42 days that is made up of six weeks of seven days each. *See Worley v. Naylor*, 6 Minn. 192, 1861 WL 1857 (1861). If the sheriff's sale occurs before the end of business on the last day, then, by definition, the sale has occurred before the expiration of six full weeks. A sheriff's sale conducted pursuant to a foreclosure by advertisement is fatally defective if notice of the sale is not published for a full six weeks before the date of sale. *Russell v. H.C. Akeley Lumber Co.*, 45 Minn. 376, 378, 48 N.W. 3, (1891).

Here, the first date of publication was December 18, 2008. The first day of the six-week period, therefore, did not start until December 19, 2008. The last day of the six-week period was January 29, 2009. Thus, the six-week publication period had not expired when the sheriff's sale took place on January 29, 2009. As such, the sheriff's sale

was fatally defective because it took place before the six-week publication period had passed.

B. MINNESOTA CASELAW ESTABLISHES THAT AN INDIVIDUAL IS ENTITLED TO THE ENTIRE LAST DAY OF A DESIGNATED PERIOD TO SATISFY A LEGAL OR CONTRACTUAL OBLIGATION.

This interpretation is consistent with Minnesota cases that hold a mortgagor has the whole of the last day of the notice or grace period to make payment and bring the mortgage current, or as in this case, to satisfy an outstanding lien amount.

The Minnesota Supreme Court addressed this principle in *Pratt v. Tinkcom*, 21 Minn. 142, 1874 WL 3773 (1874). In that case, a mortgage came due on January 24, which was "the third day of grace." 1874 WL at * 1. The day before, the mortgagee submitted a notice of foreclosure sale for publication in the local newspaper on the next publication date, which was January 25. *Id.* The evidence at trial established that five-sixths of the newspapers in which the notice appeared were actually published on January 24. *Id.* at * 2. The supreme court held that the notice of sale was unauthorized and the foreclosure sale void because at the time of publication on the January 24, no default had occurred under the terms of the mortgage. *Id.* In reaching this conclusion, the supreme court held that the mortgagor "was entitled to the *whole of the business hours of that day* [of January 24] in which to make payment." *Id.* (emphasis added). Because the notice of sale was published before the power of sale became operative and the mortgagee was authorized to give statutory notice of the foreclosure, the court concluded that the notice was without legal effect because "a publication not authorized by law is in law no publication at all." *Id.*

The supreme court relied on its decision in *Pratt* to reach a similar conclusion in *White v. Mazal*, 192 Minn. 522, 257 N.W. 281 (1934). In that case, the district court set aside a mortgage foreclosure sale because the notice of sale had not been published for the full six weeks required under the predecessor to the current version of Minn. Stat. § 580.03. 192 Minn. at 523, 257 N.W. at 282. The notice was first published on August 6, 1932, and the final date of publication was September 10, 1932. *Id.* The sheriff's sale took place on September 16, 1932. *Id.* In affirming the district court, the supreme court relied on the rule of law stated in *Pratt* that a mortgagor has all of the last day of a designated period "to make good on the obligations of his contract." *Id.* at 526, 257 at 283.

The Minnesota Supreme Court has recognized this principle in other contexts. Not long ago, the supreme court held that the statute requiring that an insured receive "at least ten days' notice of cancellation" before an insurer can cancel an automobile insurance policy entitles the insured to the whole of the 10th day to make payment. In *Jorgensen v. Knutson*, 662 N.W.2d 893 (2003), the insurance company attempted to cancel its automobile insurance policy for nonpayment of premiums by mailing a cancellation notice on November 10, 1993, that advised the insureds coverage would cease at 12:01 a.m. on November 22, 1993, unless the full policy premium was received before that date. *Id.* at 896. It sent this notice pursuant to Minn. Stat. § 65B.15, which provides: "when nonpayment of premium is the reason for cancellation . . . at least ten days' notice of cancellation . . . shall be given." *Id.* at 898 (citation omitted). The insureds claimed they mailed the premium payment on November 20, while the insurer

asserted that it did not receive payment until December 8, 1993. *Id.* at 896. During this interval, the insureds were involved in an automobile accident. *Id.* The insurer denied coverage, maintaining that the policy had been cancelled. *Id.*

In calculating the 10-day notice period, the supreme court applied the computation method set forth in Minn. Stat. § 645.15. It stated that “[i]n a situation where ten days’ notice, as calculated by Minn. Stat. § 645.15, is required, the ‘effective date of cancellation’ is the first date at which ten days will be deemed to have passed under the computation method of Minn. Stat. § 645.15.” *Id.* at 902. The supreme court observed that “the purpose of notice is not to provide a shelter for insureds who make delinquent payments; it is to provide insureds with time to either pay the owed premium or find other coverage. Extending coverage through the correctly computed ‘ten days’ achieves that purpose.” *Id.* at 903. The supreme court held that if the insureds’ premium payment was received by 12:01 a.m. on November 23, 1993, which was at the conclusion of 10 full days, the policy would not be deemed cancelled. *Id.* at 904.

The decision in *Jorgensen* is consistent the supreme court’s earlier decision in *Mansfield v. Fleck*, 23 Minn. 61, 1876 WL 4261 (1876). In *Mansfield*, the court was asked to consider whether a plaintiff has a full 10 days in which to accept an offer of judgment or otherwise be responsible for defendant’s trial costs. The statute at the time provided that a defendant could recover trial costs if it made and served plaintiff with an offer of judgment within 10 days of the commencement of trial and plaintiff did not accept the offer. *Id.* at *1 In determining this period, the court noted that the day of service of the offer must be excluded and the date of trial determined from the day it

commences. *Id.* The court held that a plaintiff "is entitled to the *full period of ten days* in which to accept or reject the offer." *Id.* (emphasis added). The court observed that the offer of judgment had been served on March 2 and the trial commenced on March 12. *Id.* The court held that the offer was made too close to trial "[a]s plaintiff had the whole of the latter day in which to decide upon the question of acceptance or rejection." *Id.*

The supreme court's decisions in *Pratt*, *White*, *Jorgensen*, and *Mansfield* establish that an individual who, by statute, is given a certain length of time in which to satisfy a legal or contractual obligation or debt is entitled to the full period of time to comply or perform the designated act. This necessarily includes the whole of the last day of the prescribed period. To rule otherwise would result in the individual receiving less than the statutorily allotted time.

C. THE DECISION IN *WORLEY V. NAYLOR*, 6 MINN. 192, 1861 WL 1857 (1861) IS DISTINGUISHABLE.

In this case, the district court relied, in part, on the decision in *Worley*. The decision in *Worley* is distinguishable because, unlike this case, the six-week publication period had, in fact, elapsed before the sheriff's sale occurred.

The *Worley* case involved an action to aside the sale of property that occurred as result of a mortgage foreclosure by advertisement. 6 Minn. 192, 1861 WL 1857. The notice of sale was first published on August 3, 1859. 1861 WL 1857 at *5. It was the regular practice of the newspaper in which the notice appeared to print at about noon and then deposit the paper in the mail "about tea time." *Id.* Often, though, the newspaper delivered papers to subscribers who stopped into the newspaper office shortly after they

had been printed and before they were deposited in the mail. *Id.* The final publication date was September 14, 1859, and the sheriff's sale occurred at 3:00 p.m. that same day. *Id.* at *2. In applying Minn. Stat. § 645.15, and after excluding August 3 and including September 14, the day of sale, the court calculated that 42 days, or six weeks of seven days each, had elapsed from the date of first publication and sale. *Id.* at *5. This, according to the court, completed the full period required for publication. *Id.*

A careful reading of the facts in *Worley* shows that a full six weeks of seven full days of 24 hours each, had elapsed between the time of first publication and the sheriff's sale. The supreme court took great pains in stressing the fact that the newspaper was published at noon and delivered to subscribers shortly after being printed. It was also careful to note that the sheriff's sale took place at 3:00 p.m. on September 14. Allowing a full 24 hour period from date and time of first publication, it becomes readily apparent that a full six weeks (of seven days (24 hours each)) had elapsed by the time the sheriff's sale actually occurred.

In this case, the last date of the publication was January 22, 2009. (A. 40) The sheriff's sale occurred on January 29, 2009. (A. 39) Unlike the sale in *Worley*, the sheriff's sale in this case occurred before a full six weeks had passed. Thus, the decision in *Worley* is distinguishable and not dispositive of this case.

D. THE UNPUBLISHED DECISION IN *DEMUTH V. MARYKNOLL*, 2008 WL 5136956 (MINN. APP. DEC. 9, 2008) IS NOT CONTROLLING.

The district court also appears to have based its decision on the unpublished decision in *DeMuth v. Maryknoll, LLC*, 2008 WL 5136956 (Minn. App. Dec. 9, 2008). But as an unpublished decision, *DeMuth* has no precedential value and is not binding authority. Minn. Stat. § 480A.08, subd. 3 (1996) (providing unpublished decisions of court of appeals are not precedential). It was therefore improper for the district court to rely on the decision in *DeMuth* as binding authority.

In addition, the decision in *DeMuth* misconstrued the decision *Worley*. In *DeMuth*, plaintiff challenged defendant's title to property, arguing that the foreclosure sale at which defendant purchased the property was void because the sale occurred one day before the expiration of the statutorily required six-week notice period under Minn. Stat. § 580.03. 2008 WL at * 1. This court affirmed the district court's dismissal of plaintiff's claims on the pleadings, reasoning that Minn. Stat. § 580.03 contemplates that the day of sale is to be included in the six-week notice period. *Id.* at * 2. In reaching this decision, this court concluded that *Worley* stands for the proposition that a foreclosure sale that occurs 42 days after the date of first publication satisfies the six-week notice requirement under Minn. Stat. § 580.03. *Id.* at * 2-3.

The decision in *DeMuth* failed to address whether a full six-week period had, in fact, elapsed between the date of first publication and the sheriff's sale. The court seems to have simply concluded that the sheriff's sale was valid because it occurred 42 days after the date of first publication. As the facts in *Worley* make clear, the sheriff's sale in

that case occurred after a full six weeks, consisting of seven 24-hour days, had elapsed after the date of first publication. The decision in *DeMuth* is inconsistent with and contrary to the decisions in *Pratt*, *White*, *Jorgensen*, *Mansfield*, and most importantly, *Worley*. It therefore is not dispositive or persuasive of the issue of how to compute the six-week notice period under Minn. Stat. § 580.03.

In this case, the sheriff's sale occurred before the full six-week publication and notice period required by Minn. Stat. § 580.03 had expired. The property owner at the time had the whole of January 29, 2009 in which to satisfy the assessment lien and avoid the foreclosure sale. To be effective, the sheriff's sale had to occur on January 30, 2009 or after. As the decisions in *Pratt*, *White*, *Mansfield*, *Jorgensen*, and *Worley* establish, the notice was deficient and the January 29, 2009 sheriff's sale was invalid and of no legal effect. Mr. Titler therefore did not acquire fee title to the Property.

E. MINN. STAT. § 580.03 WORKS IN CONJUNCTION WITH THE MORTGAGE REINSTATEMENT PROVISION IN MINN. STAT. § 580.30.

Such an interpretation is consistent with and furthers the reinstatement provisions of Minnesota's mortgage foreclosure statutes. The mortgage reinstatement statute grants an individual the ability and right to halt the sale of property subject to foreclosure if the individual pays the amount due that constitutes the default or obligation, plus certain costs, within the statutorily allotted time.

Specifically, Minn. Stat. § 580.30 provides that in any proceeding for the foreclosure of a real estate mortgage, whether by action or by advertisement, if the mortgagor, the owner, or any holder of any subsequent encumbrance or lien pays the

amount actually due and that constitutes the default at any time before the sale of the premises, "the mortgage shall be fully reinstated and further proceedings in such foreclosure *shall be thereupon abandoned.*" Minn. Stat. § 580.30 (2008) (emphasis added). The statute was enacted in 1923 as a response to the depressed economic conditions of the time and was intended to protect mortgagors. *In re Norwest Bank Metrowest Nat'l Assoc.*, 396 N.W.2d 896, 899 (Minn. App. 1986) (citing *Davis v. Davis*, 293 Minn. 44, 47, 196 N.W. 473, 475 (Minn. 1975)), *review denied* (Minn. Feb. 17, 1987). Because the statute is intended to protect mortgagors, it is to be construed against forfeiture. *Id.*; *First Trust Co., Inc. v. Leibman*, 445 N.W.2d 547, 550-551 (Minn. 1989).

The purpose of the six-week notice requirement contained in Minn. Stat. § 580.03 is to provide an individual with notice that the encumbered property will be sold at a sheriff's sale and works in conjunction with Minn. Stat. § 580.30. It provides the individual with an opportunity to cure the default or satisfy the outstanding obligation before the sale actually takes place. If the individual makes payment or satisfies the obligation giving rise to the foreclosure, then Minn. Stat. § 580.30 operates to immediately terminate all further foreclosure proceedings.

By allowing a sheriff's sale to take place on the last day of the six-week notice period, an individual is necessarily deprived of the full time period granted by Minn. Stat. § 580.03 in which to satisfy the outstanding legal or contractual obligations giving rise to the foreclosure sale. This, in turn, effectively denies the individual of the full protection of Minn. Stat. § 580.30.

Because the sheriff's sale in this case occurred before the six-week publication period required by Minn. Stat. § 580.03 had expired, it was invalid and of no effect. Mr. Gallaher therefore respectfully requests that this court set aside the sheriff's sale and reverse the district court, ruling that Mr. Titler does not have any right, title, or interest in the Property.

III. THIS COURT IS NOT BOUND BY THE PREVIOUS DECISION OF THIS COURT AND THE HOUSING COURT.

Neither this court's previous decision nor the decision of the housing court are binding on this court in this appeal.

Long ago, the Minnesota Supreme Court held that "[u]nlawful detainer proceedings are summary in nature, designed to restore to an owner prompt possession of his property, and a judgment therein does not constitute a bar in subsequent actions as to questions of title or other equitable defenses." *Pushor v. Dale*, 242 Minn. 564, 569, 66 N.W.2d 11, 14 (1954) (citations omitted).

Thus, neither the decision of the housing court nor this court's earlier decision are binding on this court, and did not bar Mr. Gallaher from challenging the validity of the sheriff's sale and Mr. Titler's claim of title to the Property in this quiet title action.

CONCLUSION

Six weeks is six weeks. The sheriff's sale at issue in this case took place before the full six-week publication and cure period required under Minn. Stat. § 580.03 had expired. It therefore is invalid and of no effect. Appellant Dennis Gallaher therefore respectfully requests that this court reverse the district court decision and rule that he is the fee owner of the Property and respondent William Titler has no right, title, or interest in the Property.

Respectfully submitted,

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Certification of Brief Length

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs.1 and 3, for a brief produced with a proportional 13 point font. The length of this brief is 4288 words. This brief was prepared using Microsoft Word 2007.

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